STATE OF MICHIGAN
IN THE SUPREME COURT

In re Estate of IRENE GORNEY.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF IRENE GORNEY,

Defendant-Appellee.

Supreme Court No. _____
Court of Appeals No. 323090
Huron Probate Court
LC No. 13-039597-CZ

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

In re Estate of WILLIAM B. FRENCH.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

DANIEL GENE FRENCH, Personal Representative for the Estate of WILLIAM B. FRENCH,

Defendant-Appellee.

Supreme Court No. _____
Court of Appeals No. 323185
Calhoun Probate Court
LC No. 2013-000992-CZ

In re Estate of WILMA KETCHUM.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

ESTATE OF WILMA KETCHUM,

Defendant-Appellee.

Supreme Court No. _____
Court of Appeals No. 323304
Clinton Probate Court
LC No. 14-28416-CZ

In re Estate of OLIVE RASMER.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Plaintiff-Appellant,

v

RICHARD RASMER, Personal Representative of the Estate of OLIVE RASMER,

Defendant-Appellee.

Supreme Court No. _____
Court of Appeals No. 326642
Bay Probate Court
LC No. 14-049740-CZ

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. Whether implementation of the estate recovery program violates procedural due process or substantive due process?

   Appellant's answer: No.

   Appellees' answer: Yes.

   Trial courts' answer: Yes, but limited to procedural due process.

   Court of Appeals' answer: Yes.

2. Is the question whether the cost of recovery is in the best economic interest of the State a determination that is left to the Department and not subject to discretion of the trial courts?

   Appellant's answer: Yes.

   Appellees' answer: No.

   Trial courts' answer: The trial courts never addressed this issue.

   Court of Appeals' answer: No.

STATUTES INVOLVED

42 USC § 1396p. Liens, adjustments and recoveries, and transfers of assets.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B) of this section, the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of—

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan (but not including medical assistance for Medicare cost-sharing or for benefits described in section 1396a(a)(10)(E) of this title).

MCL 400.112g. Michigan medicaid estate recovery program; establishment and operation by department of community health; development of voluntary estate preservation program; report; establishment of estate recovery program; waivers and approvals; duties of department; lien.

(1) Subject to section 112c(5), the department of community health shall establish and operate the Michigan medicaid estate recovery program to comply with requirements contained in section 1917 of title XIX. The department of community health shall work with the appropriate state and federal departments and agencies to review options for development of a voluntary estate preservation program. Beginning not later than 180 days after the effective date of the amendatory act that added this section and every 180 days thereafter, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over

department of community health matters and the senate and house fiscal agencies regarding options for development of the estate preservation program.

(2) The department of community health shall establish an estate recovery program including various estate recovery program activities. These activities shall include, at a minimum, all of the following:

(a) Tracking assets and services of recipients of medical assistance that are subject to estate recovery.

(b) *Actions necessary to collect amounts subject to estate recovery for medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b). Amounts subject to recovery shall not exceed the cost of providing the medical services. Any settlements shall take into account the best interests of the state and the spouse and heirs.*

(c) Other activities necessary to efficiently and effectively administer the program.

(3) The department of community health shall seek appropriate changes to the Michigan medicaid state plan and shall apply for any necessary waivers and approvals from the federal centers for medicare and medicaid services to implement the Michigan medicaid estate recovery program. The department of community health shall seek approval from the federal centers for medicare and medicaid regarding all of the following:

(a) Which medical services are subject to estate recovery under section 1917(b)(1)(B)(i) and (ii) of title XIX.

(b) Which recipients of medical assistance are subject to estate recovery under section 1917(a) and (b) of title XIX.

(c) Under what circumstances the program shall pursue recovery from the estates of spouses of recipients of medical assistance who are subject to estate recovery under section 1917(b)(2) of title XIX.

(d) What actions may be taken to obtain funds from the estates of recipients subject to recovery under section 1917 of title XIX, including notice and hearing procedures that may be pursued to contest actions taken under the Michigan medicaid estate recovery program.

(e) Under what circumstances the estates of medical assistance recipients will be exempt from the Michigan medicaid estate recovery program because of a hardship. At the time an individual enrolls in medicaid for long-term care services, the department of community health shall

provide to the individual written materials explaining the process for applying for a waiver from estate recovery due to hardship. The department of community health shall develop a definition of hardship according to section 1917(b)(3) of title XIX that includes, but is not limited to, the following:

(i) An exemption for the portion of the value of the medical assistance recipient's homestead that is equal to or less than 50% of the average price of a home in the county in which the medicaid recipient's homestead is located as of the date of the medical assistance recipient's death.

(ii) An exemption for the portion of an estate that is the primary income-producing asset of survivors, including, but not limited to, a family farm or business.

(iii) A rebuttable presumption that no hardship exists if the hardship resulted from estate planning methods under which assets were diverted in order to avoid estate recovery.

(f) The circumstances under which the department of community health may review requests for exemptions and provide exemptions from the Michigan medicaid estate recovery program for cases that do not meet the definition of hardship developed by the department of community health.

(g) Implementing the provisions of section 1396p(b)(3) of title XIX to ensure that the heirs of persons subject to the Michigan medicaid estate recovery program will not be unreasonably harmed by the provisions of this program.

(4) *The department of community health shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state.*

(5) *The department of community health shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained.*

(6) The department of community health shall not recover assets from the home of a medical assistance recipient if 1 or more of the following individuals are lawfully residing in that home:

(a) The medical assistance recipient's spouse.

(b) The medical assistance recipient's child who is under the age of 21 years, or is blind or permanently and totally disabled as defined in section 1614 of the social security act, 42 USC 1382c.

(c) The medical assistance recipient's caretaker relative who was residing in the medical assistance recipient's home for a period of at least 2 years immediately before the date of the medical assistance recipient's admission to a medical institution and who establishes that he or she provided care that permitted the medical assistance recipient to reside at home rather than in an institution. As used in this subdivision, "caretaker relative" means any relation by blood, marriage, or adoption who is within the fifth degree of kinship to the recipient.

(d) The medical assistance recipient's sibling who has an equity interest in the medical assistance recipient's home and who was residing in the medical assistance recipient's home for a period of at least 1 year immediately before the date of the individual's admission to a medical institution.

(7) The department of community health shall provide written information to individuals seeking medicaid eligibility for long-term care services describing the provisions of the Michigan medicaid estate recovery program, including, but not limited to, a statement that some or all of their estate may be recovered. [(Emphasis added).]

MCL 400.112k. Applicability of program to certain medical assistance recipients.

The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section. [(Emphasis added).]

STATEMENT OF JUDGMENT / ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant Michigan Department of Health and Human Services, formerly the Michigan Department of Community Health,[1] seeks leave to appeal the portion of the February 4, 2016 opinion of the Court of Appeals that erroneously found that MCL 400.112g(5) did not allow the Department to pursue Medicaid recovery for any amounts paid prior to July 1, 2011, the date the Medicaid State Plan Amendment was approved by the federal government, even though the approval had a July 1, 2010 effective date, and the Michigan estate recovery act was adopted in 2007. The Court of Appeals concluded that the decedents had a right to dispose of their property and maintain their estates. Based on this right, the court concluded that recovery of Medicaid costs paid between July 1, 2010 and the federal approval date somehow violated the decedents' rights to due process by implementing Medicaid recovery prior to federal approval.

The Department also seeks leave to appeal the portion of that opinion inviting widespread litigation to second-guess the Department's determination that pursuing estate recovery is cost-effective consistent with MCL 400.112g(4).

This Court should grant the Department's application for leave to appeal and reverse the opinion of the Court of Appeals for the reasons articulated in the well-reasoned partial dissent.

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[1] The Michigan Departments of Community Health and Human Services were merged into a new Department of Health and Human Services under Executive Order 2015-4, effective April 10, 2015.

INTRODUCTION

This Medicaid recovery decision affects thousands of decedents' estates and impairs the Department's ability to recover hundreds of thousands of dollars in Medicaid expenditures—funds that could be recovered to further Medicaid's purpose of providing healthcare to the poor. The Court of Appeals' decision created, over a dissent, a new right: "a right to coordinate [one's] need for healthcare services with [one's] desire to maintain [one's] estate[ ]," or a "right to elect whether to accept benefits and encumber [one's] estate[ ], or whether to make alternative healthcare arrangements." *In re Gorney Estate*, _ Mich App _ (2016); slip op at 9-10. Relying on this new right, the Court of Appeals concluded that individuals who had been receiving welfare benefits under Medicaid had a due-process right to continue to receive the same amount of benefits unencumbered by estate recovery despite a change in the statute that altered these benefits by initiating an estate-recovery program.

This new right is in reality a right to continue to receive unencumbered Medicaid benefits indefinitely—a right that, if real, would deprive the Legislature of any authority to change Medicaid benefits in the future. This Court has repeatedly rejected rights of that nature. E.g., *Rookledge v Garwood*, 340 Mich 444, 457 (1954) (" 'There can, in the nature of things, be no vested right in an existing law which precludes its change or repeal,' " quoting *Harsha v City of Detroit*, 261 Mich 586, 594 (1933)); *City of Detroit v Walker*, 445 Mich 682, 699 (1994) ("a mere expectation as may be based upon an anticipated continuance of the present general laws" is not a vested right).

Laws providing exemptions generally do not create vested rights. *United States v Carlton*, 512 US 26, 33 (1994) (taxpayers have no vested right in the Internal Revenue Code); see also *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 324-325 (2011) (tax exemption statutes do not create rights that exist in perpetuity that cannot be later altered by the Legislature). Likewise, an individual has no vested right in the substantive laws governing Medicaid benefits or the exemptions from estate recovery.

Prior to the enactment of MCL 400.112g *et seq*. in 2007, Michigan residents could qualify for Medicaid long-term care while the Legislature allowed them to retain a home valued up to $500,000. And despite receiving thousands of taxpayers' dollars for their care—individual costs which continue to skyrocket to over $60,000[2] annually—the State did not recover any of those funds from recipients' estates.

That era ended on September 30, 2007, when the Legislature enacted MCL 400.112g *et seq*. and changed the property rights of the four decedents here. MCL 400.112k. Yet the Court of Appeals turned back the clock to pre-estate recovery by creating a vested property right for recipients to leave an inheritance while simultaneously receiving government-paid, welfare dollars—a windfall nullifying estate recovery. The Court of Appeals' due-process analysis is clearly erroneous and

[2] For 2016, the Department estimates that it will cost Michigan's taxpayers $63,747.25 for an individual to receive one year of long-term care. The annual average cost without Medicaid is at least $83,950 for an individual. *Costs of Care in Your State*, U.S. Dep't of Health and Human Services, available at http://longtermcare.gov/cost-of-care-results/?state=US-MI) (accessed Feb. 18, 2016).

will cause material prejudice by creating precedent that prevents the Legislature from modifying the estate recovery program once someone begins receiving benefits. MCR 7.305(B)(5). Here, for example, the decision would bar the State from recovering from any decedent's estate amounts Medicaid paid between July 1, 2010, the effective date of Michigan's Medicaid State Plan, and July 1, 2011, the date the federal government approved the State Plan, on the theory that they were deprived by a change to the statute of the right to choose for this time period. And the Court of Appeals' due-process analysis conflicts with its prior decision *In re Keyes Estate*, 310 Mich App 266, 275 (2015), lv denied 498 Mich 968 (2016). MCR 7.305(B)(5).

The shadow cast by this erroneous decision reaches well beyond eviscerating one year of recovery. The Court of Appeals misinterpreted MCL 400.112g(5) to find a generalized due-process violation by conflating the separate tests for procedural and substantive due process. The court achieves this result by creating a right to dispose of one's property as an inheritance and elevating that right to a constitutional guarantee—a right superior to Michigan's Medicaid estate recovery program, MCL 400.112g *et seq*. It thus presents a substantial question about the validity of a legislative act. MCR 7.305(B)(1) and MCR 7.305(B)(2).

Next, the Court of Appeals invites extensive litigation on whether the cost of recovery is in the best interests of the State for all cases where the State makes a recovery claim. MCL 400.112g(4). But this determination is left to the Department, subject to legislative review, not litigation and judicial review. This precedent will overburden the Department with seeking court permission to pursue

recovery by providing courts with a case-specific report on the costs versus benefits of recovery to the State. These cases involve a matter of significant public interest and also raise significant legal issues broadly affecting estate recovery and thereby limiting recovery of Medicaid dollars available to assist the poor. MCR 7.305(B)(2).

Accordingly, the Department respectfully requests that this Court grant leave to appeal and reverse the Court of Appeals for the reasons articulated in the well-reasoned dissent.

STATEMENT OF FACTS

Background

These cases involve four decedents who received hundreds of thousands of dollars from the State's Medicaid program during their lives: Irene Gorney, William French, Wilma Ketchum, and Olive Rasmer. These cases were consolidated before the Court of Appeals because they involved nearly identical facts; the facts recited by the Court of Appeals' opinion are largely undisputed.

"Medicaid is a federal program that provides medical assistance to low-income individuals." *Keyes*, 310 Mich App at 268 n 1. On September 30, 2007, Michigan was the last state to enact a statutory scheme for estate recovery, MCL 400.112g *et seq.*, to avoid forfeiture of all federal Medicaid funding. 42 USC 1396c. Estate recovery is carried out pursuant to a Medicaid State Plan, which requires federal approval. 42 USC 1396p; MCL 400.112g(3). On May 23, 2011, Michigan's initial State Plan was finally approved by the federal government, the Centers of Medicare and Medicaid Services (CMS). *Keyes*, 310 Mich App at 268. Under federal

law, the effective date of that Medicaid State Plan was July 1, 2010. 42 CFR 447.256(c); 42 CFR 430.20. That State Plan was later amended in 2012.

Notice and express acknowledgement of estate recovery

All of the decedents here began receiving Medicaid long-term care after the passage of MCL 400.112k, which provided statutory notice that Michigan's Medicaid estate recovery program applied to persons receiving Medicaid long-term care after that date. *In re Gorney Estate*, _ Mich App _ (2016); slip op at 3 ("[T]he decedents began receiving Medicaid benefits after the September 30, 2007 passage of 2007 PA 74.") (Opinion of the court attached as Appendix A and dissenting opinion as Appendix B).

After these decedents began receiving Medicaid long-term care, the decedents, or their representative, signed an annual re-application to determine if they continued to be eligible for Medicaid—what is referred to as a DHS-4574 form. *Id.* By signing this application, the decedents elected to continue receiving benefits while also acknowledging that their estates would be subject to recovery:

> I understand that upon my death the Michigan Department of Community Health [now the DHHS] has the legal right to seek recovery from my estate for services paid by Medicaid. MDCH will not make a claim against the estate while there is a legal surviving spouse or a legal surviving child who is under the age of 21, blind, or disabled living in the home. An estate consists of real and personal property. Estate Recovery only applies to certain Medicaid recipients who received Medicaid after the implementation date of the program. MDCH may agree not to pursue recovery if an undue hardship exists. For further information regarding Estate Recovery call 1-877-791-0435. [*Id.* at_; slip op at 4.]

All of the decedents except for Gorney had a relative sign the Medicaid application on their behalf providing the above acknowledgment, such as a power of attorney (Ketchum and Rasmer) or a guardian/conservator (French). *Id.* Gorney, however, signed her own redetermination application that provided the above acknowledgment. (Gorney, Docket No. 323090, Partial Stip Facts, ¶ 18 and Pl's Exhibit 4, 4/4/12 Medicaid DHS 4574, p 6.)

Since July 1, 2010,[3] the decedents received from the State of Michigan the following amounts of government-paid welfare dollars for their long-term care under the State's Medicaid program:

- Irene Gorney - $143,301.23 (Gorney, Docket No. 323090, Partial Stip Facts, ¶ 26.)
- William French - $155,363.13 (French, Docket No. 323185, Pl's Summ Dispo Br, Exhibit 5, Voss Aff, ¶¶ 7, 16.)
- Wilma Ketchum - $129,703.63 (Ketchum, Docket No. 323304, Pl's Summ Dispo Br, Exhibit 3, Voss Aff, ¶¶ 7, 16.)
- Olive Rasmer - $178,133.02 (Rasmer, Docket No. 323304, Pl's Summ Dispo Br, Exhibit G, p 17.)

These decedents, or their representatives, did not make other arrangements to dispose of their property after MCL 400.112k was effective or even after signing the above acknowledgment regarding estate recovery. Consequently, upon their death, some of their property required probate administration and, therefore,

[3] French and Rasmer received more Medicaid benefits than what the Department sought to recover because they began receiving long-term care sometime between September 30, 2007, and July 1, 2010. As explained below, the Department only collects form July 1, 2010 forward—the federal effective date of the State Plan.

required the Department to pursue estate recovery. MCL 400.112h(a) (estate recovery is limited to probate property).

PROCEEDINGS BELOW

The Department's claims are disallowed

After the death of each of these decedents, the Department filed a statement and proof of claim against their probate estates to seek recovery of the previously stated amounts. All of the personal representatives summarily disallowed the Department's estate recovery claims. *Gorney*, _ Mich App at _; slip op at 4. This required the Department to commence civil actions against each estate, or personal representative, to set aside the disallowance. MCL 700.3804(2); MCR 5.101(C)(2).

In each of these cases, the estates, or personal representatives, maintained that the Department allegedly failed to provide an initial enrollment notice regarding estate recovery pursuant to MCL 400.112g(3)(e), MCL 400.112g(7), or both, and the failure to do so violated procedural due process. *Gorney*, _ Mich App at _; slip op at 4. None of these cases argued a violation of substantive due process.[4]

[4] French, Gorney, and Ketchum all argued that failure to provide notice consistent with MCL 400.112g(3)(e), MCL 400.112g(7), or both, violated procedural due process. But Gorney's estate raised substantive due process for the first time on appeal, and contrary to its position before the probate court. (Gorney, Docket No. 323090, Amd Aff Def, 5/6/14, ¶ 8.) The Rasmer estate was the only probate court decision not to rule against the Department on due process grounds.

Probate court litigation to set aside the disallowances

The probate courts all upheld the disallowances of the Department's estate recovery claims by holding that the Department failed to comply with the notice provisions of either MCL 400.112g(3)(e), MCL 400.112g(7), or both—arguing that notice must be provided at initial Medicaid enrollment as a condition precedent before the Department may pursue recovery. The probate courts in French and Rasmer upheld the disallowance under both statutory provisions following summary disposition. (French, Docket No. 323185, Summ Dispo Opinion and Order, attached as Appendix C; Rasmer, Docket No. 326642 Summ Dispo Opinion and Order, attached as Appendix D.) The probate court in Gorney upheld the disallowance under MCL 400.112g(7) following a bench trial. (Gorney, Docket No. 323090, Judgment, attached as Appendix E.) But the probate court in Ketchum relied only on MCL 400.112g(3)(e) to bar the Department's claim following summary disposition. (Ketchum, Docket No. 323304, Summ Dispo Opinion and Order, attached as Appendix F.)

In addition, the probate courts in all the cases except for Rasmer held that the purported failure to comply with these statutory provisions violated the decedents' due-process rights. *Gorney*, _ Mich App at _; slip op at 4.

Ketchum's estate also argued that that Department should be barred from recovery pursuant to MCL 400.112g(4) because the estate's anticipated attorney fees of litigating the disallowance might consume the inventory value of the estate. (Ketchum, Docket No. 323304, Def's Br Opposing Summ Disp, 7/22/2014, at 16-18.) The probate court did not rule on this issue.

The personal representative for Ketchum's estate filed her first account on November 12, 2014, in the probate administration file and requested attorney fees in the amount of $11,062.92 be allowed—attorney fees incurred in preventing estate recovery—in addition to other expenses having priority over the Department's claim. (Account of Fiduciary, 11/12/2014, Clinton County file no. 13-28308-DE.) The personal representative's account demonstrating what assets are available for estate recovery was filed *after* the probate court granted summary disposition for the estate on August 5, 2014.

The Department timely appealed these decisions to the Court of Appeals.

Court of Appeals opinion

On May 20, 2015, the Court of Appeals granted the Department's request to consolidate these four cases.

The Court of Appeals relied on its earlier decision in *Keyes* and properly rejected the estates' arguments that the Department failed to comply with MCL 400.112g(3)(e) and MCL 400.112g(7). *Gorney*, _ Mich App at _; slip op at 5-6. Additionally, the Court of Appeals properly rejected the estates' procedural-due-process arguments based on the purported lack of notice addressed in *Keyes*. *Id.* at _; slip op at 8 ("The estates had the same opportunity to contest the estate recovery claims in the probate court, and therefore received the notice and opportunity to be heard required to satisfy due process.").

Nevertheless the Court of Appeals took the opportunity to search *Keyes*'s parameters and find a due-process violation. As stated by the Court of Appeals,

"We first note that the estates erroneously identified the date on which their due process rights were violated." *Id.* at _; slip op at 8. After recognizing that all four estates misidentified their positions, the Court of Appeals created a due-process violation by misinterpreting the word "implement" in MCL 400.112g(5).

Using a dictionary, the Court of Appeals interpreted the word "implement" to mean "'[c]arry out, accomplish; *esp:* to give practical effect to and ensure of actual fulfillment by concrete measures" and "to provide instruments or means of expression for.'" *Id.* at _; slip op at 9. Based on this dictionary definition, the Court of Appeals held that

> the DHHS could not "implement" the MMERP [Michigan Medicaid estate recovery program] before the federal government approved it. The DHHS sought "to give practical effect" to its recovery plan by making it "effective" July 1, 2010. This violated MCL 400.112g(5). [*Gorney*, _ Mich App at _; slip op at 8.]

While Michigan's State Plan was approved by the federal government on May 23, 2011, its effective date based on federal regulations was July 1, 2010. 42 CFR 447.256(c); 42 CFR 430.20. The Department began implementing estate recovery shortly after the Medicaid State Plan was approved by the federal government.

Relying on this interpretation as the bedrock of its due-process analysis, the Court of Appeals found that pursuing recovery from the effective date of the Medicaid State Plan violates the right to dispose of one's property as an inheritance: "The decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates." *Gorney*, _ Mich App at _; slip op at 9. According to the Court of Appeals,

> By applying the recovery program retroactively to July 1, 2010, the Legislature deprived individuals of their right to elect whether to accept benefits and encumber their estates, or whether to make alternative healthcare arrangements. The Legislature impinged on the decedents' rights to dispose of their property. Despite that the DHHS does not try to recover until the individual's death, that person's property rights are hampered during his or her life. Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property. Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' rights to due process. [*Id.* at _; slip op at 10.]

Notably absent from the court's opinion is any analysis of how the decedents were deprived of notice and an opportunity to be heard, or how estate recovery is not rationally related to a legitimate government interest.

In addition, the Court of Appeals invited litigation on whether the costs of recovery is in the best economic interests of the State. MCL 400.112g(5). Although the court acknowledged that the appellate argument of Ketchum's estate was cursory and never addressed by the trial court, it rejected the Department's policy that recovery is not subject to litigation. The Court of Appeals, however, never addressed the standards in the 2012 State Plan: "Recovery is considered cost-effective when the potential recovery amount of the estate exceeds the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a $1,000 threshold." (Medicaid State Plan 4/1/2012, 4.17-A, p 3, attached as Appendix G, available at http://www.mdch.state.mi.us/dch-medicaid/manuals/MichiganStatePlan/MichiganStatePlan.pdf) (accessed Feb. 17, 2016).

The Court of Appeals' partial dissent

The dissenting opinion concurred "with the majority's determinations that the notice provided in the redetermination application was statutorily sufficient, the lack of notice at the time of enrollment did not violate due process, and the estates did not have a due-process right to the continuation of a favorable Medicaid law." *Gorney*, _ Mich App at _; slip op at 1 (Jansen, J., dissenting). And the dissent properly rejected that seeking recovery from the effective date of the Medicaid State Plan violated due process, and that trial courts should not review whether the cost of recovery is in the best economic interests of the State. *Id.* at _; slip op at 3-4 (Jansen, J., dissenting).

Regarding due process, the dissent correctly pointed out that the Court of Appeals' prior decision in *Keyes* was binding precedent that should have controlled the outcome of these cases because "this case is similar to *Keyes* since th[e] Court in *Keyes* held that the estate recovery program did not violate due process in spite of the fact that the decedent began receiving Medicaid benefits in April 2010." *Id.* at _; slip op at 3 (Jansen, J., dissenting).

But even if *Keyes* were not binding, the dissent correctly argued that the Court of Appeals created a new right that is not protected by the Due Process Clause. As stated by the dissent, the property right created by the Court of Appeals cannot support any violation of the Due Process Clause:

> I do not believe that the interest articulated by the majority constitutes a protected property interest. The *decedents were not deprived of the use and possession of their property during their lives*. See *Bonner*, 495 Mich at 226. In addition, the decedents were not deprived of the right to dispose of their property through transfer or

> sale since the decedents were not prevented from selling or transferring their property while they were alive. See *Loretto*, 458 U.S. at 435. At most, the interest at stake can be characterized as the right to choose how to manage property or the right to make alternative healthcare arrangements instead of encumbering an estate. See *Id.* I conclude that *there is no existing rule or common understanding establishing the right to make alternative healthcare arrangements or the right to choose how to manage property*. See *Roth*, 408 U.S. at 577. [*Gorney*, _ Mich App at _; slip op at 3 (Jansen, J., dissenting) (emphasis added).]

Likewise, the dissent recognized that the majority was simply speculating on how the decedents would have disposed of their property. "Furthermore, even assuming that there is a due-process right that was violated when the DHHS applied the estate recovery program retroactively, the right is personal to the decedents, and it is impossible for the estates to know what alternative arrangements the decedents would have made." *Id.* at _; slip op at 4 (Jansen, J., dissenting).

The dissent also rejected that the Department's decision to pursue recovery consistent with MCL 400.112g(4) is reviewable by the trial courts because whether recovery is cost-effective and in the best interest of the state is left to the Department's determination. *Id.*

This timely application for leave follows.

ISSUE PRESERVATION

The due-process issue was ruled on by the Court of Appeals, and procedural due process was preserved below. *Radtke v Everett*, 442 Mich 368, 397 (1993). The second issue—whether the Legislature left it to the Department or the courts to determine whether the cost of recovery is in the best interest of the State— was

raised by Ketchum's estate before the trial court and the Court of Appeals. *Id.* at 397.

STANDARD OF REVIEW

This Court reviews de novo questions of constitutional law, such as whether a party has been afforded due process. *Bonner v City of Brighton*, 495 Mich 209, 221 (2014). In addition, this case presents an issue of statutory interpretation, which this Court reviews de novo. *IBM v Dep't of Treasury*, 496 Mich 642, 647 (2014).

ARGUMENT

I. Implementation of the estate recovery program did not violate procedural due process or substantive due process.

The generalized due-process violation identified by the Court of Appeals establishes a dangerous precedent to limit estate recovery: the right to dispose of one's property as an inheritance is superior to the government's interest in complying with the federal mandate to recover Medicaid payments from decedents' estates and provide for the poor. But the only reason the decedents retained any conceivable property right was due to legislative grace, which changed in 2007 with the enactment of MCL 400.112g *et seq*. There was no due-process violation.

Generally, the Due Process Clause

> guarantees that no person shall be deprived of "life, liberty, or property, without due process of law." Prior caselaw has interpreted this language to "guarante[e] more than fair process," but to encompass a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them." [*Bonner*, 495 Mich at 225 (citations omitted).]

Before addressing these two distinct due-process protections, a court must first articulate whether the purported interest genuinely comes within the definition of "life, liberty or property." *Id.* (citations omitted). "If it does not, the Due Process Clause affords no protection." *Id.*

As illustrated below, pursuing recovery for benefits received from the effective date of the Medicaid State Plan does not deprive the decedents of a vested property right to leave an inheritance, and, therefore, there is no due-process protection. And even if there was such a right, there are simply no procedural or substantive due-process violations. This precedent will impact *thousands* of estate recovery cases because it incorrectly applies due process to insulate Medicaid recipients against any changes to the estate recovery program for the sole purpose of leaving an inheritance rather than repaying the taxpayers.

A. The decedents were not deprived of a vested property interest.

At the expense of future Medicaid recipients, the Court of Appeals creates the right to dispose of one's property while ignoring the statutory landscape of Medicaid and estate recovery—creating a right that cannot be legislatively impaired. But there is no such property right, and there was no unconstitutional deprivation.

1. The Court of Appeals failed to carefully define the right to dispose of one's real property as an inheritance.

The Court of Appeals identified a property right under the Due Process Clause for the decedents to "maintain their estates" or "to dispose of their property." *Gorney*, _ Mich App at _; slip op at 9-10 (opinion of the Court). But Medicaid

"should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." *Idaho Dep't Of Health & Welfare v McCormick*, 153 Idaho 468, 472 (2012) (citations and quotations omitted).

The path for any due-process analysis must first be illuminated with a careful description of the property right to avoid stumbling in the dark and fumbling to find a due-process violation:

> Property interests, of course, are not created by the Constitution. Rather they are created and *their dimensions are defined by existing rules or understandings that stem from an independent source such as state law*—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. [*Bd of Regents of State Colleges v Roth*, 408 US 564, 577 (1972) (emphasis added).]

The dimensions of this property right cannot be isolated by ignoring the fundamental understanding that Medicaid is the "payer of last resort." *Arkansas Dep't of Health & Human Services v Ahlborn*, 547 US 268, 291 (2006). "Accordingly, excess resources *saved by virtue of Medicaid funds* are meant to be tracked and recovered." *McCormick*, 153 Idaho at 471 (emphasis added). The Court of Appeals ignored these fundamentals.

By ignoring general Medicaid principles, the Court of Appeals obviously did not carefully define the property right it so broadly pronounced. The right circumscribed by the Court of Appeals is not about the use and possession of the property, *Bonner*, 495 Mich at 225-226, because Medicaid recipients retain that right throughout their lifetime. 42 USC 1396p(h)(5) (resources defined by 42 USC 1382b(a)(1)); 42 USC 1382b(a)(1); see also Bridges Eligibility Manual (BEM) 400, pp 31-32 (for purposes of eligibility, value of beneficiary's homestead is excluded up to

$500,000 as adjusted). That is, legislative grace is the only reason Medicaid recipients were previously allowed to retain a home up to $500,000 in value while receiving thousands of dollars' worth of publically-funded long-term care. But some things change.

The devastating impact of the Court of Appeals' holding is that once a recipient begins receiving Medicaid, the Legislature would now be prohibited from altering the parameters of the Medicaid or estate recovery programs—essentially creating Medicaid tenure. For example, if an individual enrolls in Medicaid in 2016, and in 2017 the Legislature amends MCL 400.112h and subjects both probate and non-probate property to estate recovery, under the court's due-process analysis, the Legislature would have thus deprived the Medicaid recipient's property right to use non-probate transfers to by-pass estate recovery. The Court of Appeals, however, cites no caselaw or long-standing jurisprudence for creating such an extreme property right.

The dissent correctly concludes that "there is no existing rule or common understanding establishing the right to make alternative healthcare arrangements or the right to choose how to manage property." *Gorney*, _ Mich App at _; slip op at 3-4 (Jansen, J., dissenting). This is because an individual has no absolute or vested right in the substantive laws governing Medicaid benefits or the change in treatment in how Medicaid approaches homesteads. See *Saxon v Dep't of Social Services*, 191 Mich App 689, 701 (1991) (Legislature is not precluded from making substantive changes to public benefits); see also *Richardson v Belcher*, 404 US 78,

81 (1971) (due process does not limit power of Congress to make substantive changes to public benefits). Such a property right is not only misconstrued but will drastically impair Michigan's scarce Medicaid dollars designed to assist the poor and limit estate recovery for the sole purpose of preserving an inheritance.

2. The Court of Appeals examined this property right in a vacuum by ignoring MCL 400.112k and the acknowledgments.

Not only did the Court of Appeals carelessly define the property right, but it ignored that any such property right is circumscribed by the enactment of MCL 400.112g *et seq*. Because MCL 400.112k was enacted in 2007, the decedents did not have a legitimate claim of entitlement to leave their property as an inheritance; they merely had a unilateral expectation—and perhaps misguided—to evade Medicaid recovery. This is not a property right protected by the Due Process Clause.

MCL 400.112k provides, "The Michigan medicaid estate recovery program shall only apply to medical assistance recipients who began receiving medicaid long-term care services after the effective date of the amendatory act that added this section." Because all the decedents here began receiving Medicaid long-term care *after* September 30, 2007 when MCL 400.112k was enacted, their property rights must be viewed in light of this change in the law. That is, "[p]eople are presumed to know the law." *Adams Outdoor Advertising v East Lansing* (*After Remand*), 463 Mich 17, 27 n 7 (2000). At the time the decedents began receiving long-term care they were presumed to be aware of estate recovery via MCL 400.112k and that their

probate estates would be subject to estate recovery consistent with MCL 400.112h. Their property rights changed accordingly.

The Court of Appeals-created superior right to dispose of one's property ignores that the Legislature changed the legal landscape regarding Medicaid and the treatment of recipient's property after death. "It is the general rule that that which the legislature gives, it may take away." *Lahti v Fosterling*, 357 Mich 578, 589 (1959); see also *In re Kurzyniec Estate*, 207 Mich App 531, 538 (1994) (recognizing that the Department is free to change its policy to comply with state and federal law). Although the Legislature previously did not collect from a recipient's estate, at the threat of the federal government stopping all federal funding for Medicaid, the Legislature ended the era of providing long-term care benefits without recovery in 2007 when it enacted MCL 400.112k.

This is no different than the Legislature eliminating a tax exemption. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 324-325 (tax exemption statutes do not create rights that exist in perpetuity that cannot be later altered by the Legislature); *Walker*, 445 Mich at 703 (taxpayer has no vested right in continuance of a tax law).

The danger of the Court of Appeals' precedent is the reach of its broad holding. The court holds that it is unfair that the decedents received hundreds of thousands of dollars for their care, and they cannot also leave their homesteads—up to $500,000—to their children or heirs. This unfairness is illusory because each decedent knew or should have known that accepting long-term care benefits would

make their estates subject to Medicaid recovery and lawful claims. And the unfairness is the court ransacking the fundamental purpose of the estate recovery program: track and recover assets to recoup the Medicaid expenditures the decedents benefited from in order to provide assistance to future recipients—who are low-income individuals. MCL 400.112g(2)(a).

Applying this illogical unfairness creates a precedent that trickles down to every part of the estate recovery program and prohibits the Legislature or the Department from making substantive changes to the law governing public benefits—effectively subjugating estate recovery to the whim of the Medicaid recipient's unilateral expectation to leave an inheritance. This new and one-sided right creates a standard that can never be satisfied without somehow impacting some aspect of the decedent's property or existing estate plan to circumvent estate recovery.

The Court of Appeals' presumptive unfairness is quite embellished considering that all of the decedents elected to continue receiving Medicaid knowing that their estates would be subject to recovery when they all signed the following acknowledgment: "I understand that upon my death the Michigan Department of Community Health has the *legal right to seek recovery from my estate for services paid by Medicaid*." *Gorney*, _ Mich App at _; slip op at 4 (emphasis added).

In sum, the Court of Appeals considered the property right in a vacuum by ignoring much of Medicaid law and the substantive changes the Legislature made

to welfare laws affecting these decedents' homesteads. Their property rights were not absolute, but defined by the enactment of MCL 400.112k.

3. The decedents did not have a vested property right to leave an inheritance.

Even if there was such a right, it is not a vested property right protected by the Due Process Clause. Notably the decedents sat on their rights to dispose of their real property *after* MCL 400.112k was codified and even *after* explicitly acknowledging that their estates would be subject to estate recovery—only after the decedents had passed did the heirs raise the instant challenges to preserve their inheritances on the backs of future Medicaid recipients. Thus, they merely had a unilateral expectation to leave an inheritance unencumbered by the long-term care benefits the decedents received and obviously benefited from.

To be protected by the Due Process Clause, a property interest must be a vested right. *General Motors Corp v Dep't of Treasury*, 290 Mich App 355, 370 (2010). This Court explained that

> [t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. [*Williams v Hofley Mfg Co*, 430 Mich 603, 610 (1988), quoting *Roth*, 408 US at 577.]

The right to dispose of property as an inheritance is not a vested right because the Estates and Protected Individual's Code, MCL 700.1101 *et seq.*, states:

> An individual's power to leave property by will and the rights of creditors, devisees, and heirs to his or her property, are subject to the

> restrictions and limitations contained in this act to facilitate the prompt settlement of estates. . . . [MCL 700.3101.]

This section further explains that the decedent's ability to dispose of one's property has limitations. All probate property is "subject to homestead allowance, family allowance, and exempt property, to *rights of creditors*, to the surviving spouse's elective share, and to administration." MCL 700.3101 (emphasis added); see *In re Estate of Jajuga*, _ Mich App _ (2015) (Docket No. 322522); slip op at 14 (an adult child has a statutory right to an exempt property allowance, MCL 700.7404, that cannot be eliminated by the decedent's will). Because the decedents' right to leave their property to their heirs at death remains subject to the rights of creditors, such as the Department, the decedents merely had an expectation to provide an unencumbered inheritance. MCL 700.3101; MCL 700.3805(1)(f).

In sum, the Court of Appeals created a right to dispose of one's property as an inheritance and failed to identify how estate recovery actually deprived the decedents of this purported right. Unless this Court grants this application and reverses the Court of Appeals, the Legislature will be prevented from making substantive changes to public benefits law once a person receives Medicaid.

B. The Court of Appeals improperly found a due-process violation by conflating the separate constitutional tests for procedural and substantive due process.

Assuming there is such a property right to dispose of one's property as an inheritance, the Court of Appeals erroneously found a generalized due process

violation.[5] In *Bonner*, this Court held that there is no general due-process right. 495 Mich at 224-225. The Court of Appeals relies on *Bonner*, yet it ignores this Court's admonishment by improperly conflating the separate tests required for procedural and substantive due process.[6]

> As stated by the Court of Appeals,
>
> > Between July 1, 2010, and July 1, 2011, the date on which the plan was actually "implement[ed]," the decedents lost the right to choose how to manage their property. Taking their property to recover costs expended between July 1, 2010 and plan implementation would therefore violate the decedents' rights to due process. [*Gorney*, _ Mich App at _; slip op at 10 (opinion of the Court).]

The Court of Appeals engaged in no analysis of how the decedents were deprived of notice and an opportunity to be heard, *Keyes*, 310 Mich App at 275, or how the government's action was arbitrary. *Bonner*, 495 Mich at 235.

When the separate constitutional tests for procedural and substantive due process are applied to these cases, there are no due-process violations. To the

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[5] The Court of Appeals apparently misunderstood the Department's procedural-due-process argument. The Department did not argue that "upon a decedent's death, his or her property rights extinguished," or that the due process claim is merely extinguished at death. *Gorney*, _ Mich App at _; slip op at 8-9 (opinion of the Court). Rather, the Department argued that the decedents were not deprived of a vested property interest, and even if they were, the Department complied with procedural due process. See, e.g. Docket No. 323090, Department's Br, 11/26/14, at 21.

[6] To aid in its due-process analysis, the Court of Appeals relied on *In re Estate of Burns*, 131 Wash 2d 104 (1997). *Gorney*, _ Mich App at _; slip op at 10 (opinion of the Court). But *Burns* is not a due-process case: "We do not reach the Estates' remaining arguments regarding due process and the contract clause." *Burns*, 131 Wash 2d at 120. The Court of Appeals' misunderstanding of due process is demonstrated by its superficial analysis.

extent procedural due process applies in these cases, the Court of Appeals was bound by its prior decision in *Keyes*.

1. The decedents, or their representatives, received sufficient procedural due process because they received notice and the opportunity to be heard.

In finding a generalized due-process violation, the Court of Appeals not only side-stepped binding precedent in *Keyes*, but it never addressed how the decedents, or their heirs, were deprived of notice and an opportunity to be heard. Under the Court of Appeals' analysis, however, the procedures actually provided are irrelevant, and the court creates a new standard that is impossible to satisfy.

"[T]he procedural component [of the Due Process Clause] is fittingly aimed at ensuring constitutionally sufficient *procedures* for the protection of life, liberty, and property interests." *Bonner*, 495 Mich at 224 (emphasis added). The Court of Appeals in *Keyes* succinctly and accurately set forth the correct analysis for procedural due process:

> When a protected property interest is at stake, due process generally requires notice and an opportunity to be heard. *Hinky Dinky Supermarket, Inc v Dep't of Community Health,* 261 Mich App 604, 606 (2004). Due process is a flexible concept and different situations may demand different procedural protections. *Mathews v Eldridge,* 424 US 319, 334 (1976). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Id.* at 333 (quotation marks and citation omitted). The question is whether the government provided "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *In re Petition by Wayne Co Treasurer,* 478 Mich 1, 9; (2007) (quotation marks and citations omitted). [*Keyes*, 310 Mich App at 274 (parallel citations omitted).]

The Court of Appeals here not only side-stepped *Keyes*, but it did not engage in any analysis of the procedural factors this Court articulated in *Bonner*:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Bonner*, 495 Mich at 235 (citations omitted).]

Had the Court of Appeals properly applied the above analysis, it would not have concluded that implementation of estate recovery violated procedural due process.

For example, the dissent correctly applied *Keyes* to find that there was no procedural due process violation. *Gorney*, _ Mich App at _; slip op at 3 (Jansen, J., dissenting). In *Keyes*, Esther Keyes began receiving Medicaid long-term care in April 2010. *Keyes*, 310 Mich App at 268-269. Although Keyes did not receive notice of estate recovery at initial enrollment, her son signed a Medicaid re-application in 2012 that provided the standard estate recovery notice via an acknowledgment. *Id.* The *Keyes* court held that MCL 400.112g did not require notice at initial Medicaid enrollment, only at an eligibility determination under MCL 400.112g(7). *Id.* at 275.

Regarding due process, the *Keyes* court held:

> In this case, the trial court determined that allowing estate recovery under the Act would violate Esther's right to due process because she did not receive notice of estate recovery at the time that she enrolled, as required by MCL 400.112g. However, we have already determined that MCL 400.112g does not require notice at the time of enrollment. Further, the trial court's decision improperly conflated statutory notice issues with the notice issues involved in due process. *In this case, the estate was personally apprised of the Department's action seeking estate recovery, and it had the opportunity to contest the possible deprivation*

> *of its property in the probate court. It received both notice and a hearing, which is what due process requires.* [*Keyes*, 310 Mich App at 392 (citation omitted).]

If the estate or personal representative, on behalf of the decedents, had the opportunity to contest the deprivation of the property right regarding notice as in *Keyes*, then the decedents here equally had the opportunity to contest the right to dispose of one's property as an inheritance. *Gorney*, _ Mich App at _; slip op at 3 (Jansen, J., dissenting). All the decedents here clearly received notice and used every procedure available to thwart *any* recovery and preserve a taxpayer-subsidized inheritance.

Likewise, the dissent accurately points out that the alleged deprivations here and *Keyes* are nearly identical:

> Here, the DHHS sought to recover for Medicaid benefits paid on behalf of the decedents since July 1, 2010. Thus, this case is similar to *Keyes* since th[e] Court in *Keyes* held that the estate recovery program did not violate due process in spite of the fact that the decedent began receiving Medicaid benefits in April 2010. See [*Keyes*, 310 Mich App] at 275. Therefore, I conclude that *Keyes* dictates the outcome that the estate recovery program did not violate the decedents' right to due process. See *Id.* [*Gorney*, _ Mich App at _; slip op at 3 (Jansen, J., dissenting).]

Because the decedents here, or their representatives, received notice and an opportunity for a hearing, there was no procedural-due-process violation. *Bonner*, 495 Mich at 238 ("[D]ue process was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."). Each estate disallowed the Department's claim and fully litigated that issue before the probate court. That is all the process that was due.

2. Implementing estate recovery satisfies substantive due process because it is rationally related to a legitimate government interest.

Just like the cursory procedural-due-process analysis, the Court of Appeals engaged in no meaningful analysis to address a substantive-due-process violation. When substantive due process is analyzed under the proper test, the estate recovery program easily satisfies rational basis.

As explained above, the Court of Appeals did not clearly follow this Court's precedent by failing to define the property right that was allegedly impaired.

> " 'Substantive due process' analysis must begin with a careful description of the asserted right," for there has "always been reluctan[ce] to expand the concept of substantive due process" given that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." [*Bonner*, 495 Mich at 226-227 (citations omitted).]

The Court of Appeals did not exercise "judicial self-restraint" because it summarily concludes that "[t]he decedents had a right to coordinate their need for healthcare services with their desire to maintain their estates." *Gorney*, _ Mich App at _; slip op at 9 (opinion of the Court). Strangely, the Court of Appeals recognizes this purported right, although it fails to refer to any other court that has recognized such a broad-encompassing right. Under the Court of Appeals' analysis, this right to receive unencumbered Medicaid benefits would, for example, prevent the Legislature from ever modifying hardships or exemptions from estate recovery once a person begins receiving Medicaid.

And this property right can hardly be said to be the product of "utmost care" without actually considering what rights the decedents retained to dispose of their

property under existing Medicaid policy, such as BEM 405. Equally ignored was that the Legislature provided that all individuals who receive Medicaid long-term care after September 30, 2007 would be *subject* to estate recovery, MCL 400.112k, and that recovery would be pursued against probate property, MCL 400.112h.

Regardless, the right implicated here is not a fundamental right demanding a level of scrutiny beyond rational basis. This Court in *Bonner* did not even recognize a fundamental right to repair a structure before demolition. *Bonner*, 495 Mich at 228-229 (right to repair before demolition is not a fundamental right and is subject to rational basis only). While the Court of Appeals creates a loophole to circumvent estate recovery, it failed to apply any coherent standard or examine this right under rational basis:

> "Rational basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with 'mathematical nicety,' or even whether it results in some inequity when put into practice." *Crego v Coleman*, 463 Mich 248, 260 (2000). Rather, it tests only whether the legislation is reasonably related to a legitimate governmental purpose. The legislation will pass "constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Id.* at 259–260. To prevail under this standard, a party challenging a statute must overcome the presumption that the statute is constitutional. *Thoman v Lansing*, 315 Mich 566, 576 (1946). [*TIG Ins Co, Inc v Dep't of Treasury*, 464 Mich 548, 557-558 (2001) (parallel citations omitted).]

There is nothing unreasonable or even arbitrary about the Department complying with the law in pursuing recovery to preserve public benefits and ensure they are available for future Medicaid recipients. 42 USC 1396p(b)(1)(B); MCL 400.112g(1). Federal law requires all states to collect any Medicaid correctly paid under a State Plan, 42 USC 1396p(b), or forfeit federal funding for Medicaid.

"Medicaid . . . should not facilitate the transfer of accumulated wealth from nursing home patients to their non-dependent children." *McCormick*, 153 Idaho at 472 (citations and quotations omitted). Regardless, there is no genuine dispute that the state has a legitimate interest in seeking to recover for the cost of public benefits paid on behalf of the decedents.

3. The Department may recover Medicaid benefits paid prior to the federal government approval date.

The Court of Appeals' general due-process violation is based on a misinterpretation of MCL 400.112g(5) to conclude that implementation of estate recovery was applied retroactively to somehow impair the decedents' property rights. But MCL 400.112g(5) does not dictate the parameters of what Medicaid payments the Department may recover. Rather, it provides the date that the recovery program may begin.

MCL 400.112g(5) provides that the Department "shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained." The primary goal of statutory construction is to ascertain and "give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski v City of Allen Park*, 465 Mich 675, 683 (2002). A court must "give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous." *Id.* A court must "apply the language of the statute as enacted, without addition,

subtraction, or modification." *Lesner v Liquid Disposal*, 466 Mich 95, 101-102 (2002).

The plain language of MCL 400.112g(5) does not dictate the parameters of what Medicaid payments are subject to recovery. That is, the Legislature did not limit the amount of recovery to post-implementation benefits. Yet, the Court of Appeals improperly expanded the plain language when it concluded that this provision limited recovery to benefits paid after the federal government approved the State Plan Amendment. See *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 66 (2002) ("The role of the judiciary is not to engage in legislation.").

Under the Court of Appeals' interpretation, MCL 400.112g(5) is transformed to the Department "shall not implement a Michigan medicaid estate recovery program until approval by the federal government is obtained *and shall only collect amounts subject to estate recovery that are paid after the approval date*."

But the Court of Appeals' interpretation is illogical. By misinterpreting and isolating MCL 400.112g(5), the court ignored that there are other statutory provisions governing the amount of recovery. Statutes must be examined as whole and cannot be read in isolation. *Keyes*, 310 Mich App at 270, citing *State ex rel Gurganus v CVS Caremark Corp*, 496 Mich 45, 57 (2014). MCL 400.112g(2)(b) requires the Department to establish activities of the estate recovery program, including in part "[a]ctions necessary to *collect amounts subject to estate recovery for medical services as determined according to subsection (3)(a) provided to recipients identified in subsection (3)(b)."* (Emphasis added).

MCL 400.112g(3)(a) and (b) require the Department to "seek approval" from the federal government for which services and recipients are subject to recovery. None of these provisions restrict the amount of Medicaid benefits subject to estate recovery to post-federal-approval benefits—i.e. July 1, 2011. Nor does federal law contain any such limitation. See 42 USC 1396p(b) ("[T]he State shall seek adjustment or recovery of *any medical assistance* correctly paid on behalf of an individual under the State Plan . . . .") (emphasis added).

Lastly, the Department collecting from the effective date of the Medicaid State Plan does not involve retroactivity—it merely confirms an obligation existing since September 30, 2007. MCL 400.112k. In *United States v Carlton*, 512 US 26, 33-35 (1994), the U.S. Supreme Court rejected a due-process challenge on retroactively applying a 1987 tax law amendment to transactions the taxpayer made in 1986 while relying on the pre-amendment law. The Court in *Carlton* held that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id*. at 33; see also *Gillette Commercial Operations N Am & Subsidiaries v Dep't Of Treasury*, _ Mich App _ (2015) (Docket No. 325258 *et al*); slip op at 25 (retroactive impact on numerous taxpayers of State withdrawing from Multistate Tax Compact does not violate due process because there is no vested right in continuation of that law).

The Court of Appeals improperly interpreted MCL 400.112g(5) as estate recovery being applied retroactively and restrict the amounts of medical assistance subject to recovery. This Court should grant leave and correct these errors.

II. The Legislature authorized the Department to make the determination of whether the cost of recovery is in the best interest of the State.

Cost-effectiveness of recovery is a matter of agency discretion, not judicial determination. Whether the Department is complying with MCL 400.112g(4) is a determination subject to review by the Legislature, MCL 400.112j(2), not the courts.

MCL 400.112g(4) provides that the Department "shall not seek medicaid estate recovery if the costs of recovery exceed the amount of recovery available or if the recovery is not in the best economic interest of the state." The primary goal of statutory construction is to ascertain and "give effect to the Legislature's intent as expressed in the words of the statute." *Pohutski*, 465 Mich at 683. A court must "apply the language of the statute as enacted, without addition, subtraction, or modification." *Lesner*, 466 Mich at 101-102.

The plain language obviously requires that the Department evaluate when state resources should be used to pursue recovery and comply with federal law. The Court of Appeals, however, reads in the statute that an estate may raise MCL 400.112g(4) as a judicial defense to defeat estate recovery. By reading MCL 400.112g(4) in isolation, the Court of Appeals ignores that the Legislature already provided in MCL 400.112j(2) its desired remedy to determine whether the Department is in compliance with MCL 400.112g(4):

> Not later than 1 year after implementation of the Michigan medicaid estate recovery program and each year after that, the department of community health shall submit a report to the senate and house appropriations subcommittees with jurisdiction over department of community health matters and the senate and house fiscal agencies *regarding the cost to administer the Michigan medicaid estate recovery*

> *program and the amounts recovered under the Michigan medicaid estate recovery program*. [(Emphasis added).]

In regard to MCL 400.112g(4), the Court of Appeals notes "that the probate court did not consider this issue on the record and the estate's appellate argument is cursory. The statutes provide no guidance on the application of MCL 400.112g(4)." *Gorney*, _ Mich App at _; slip op at 6. This should have ended the Court of Appeals' analysis.

But the Court of Appeals proceeded and invited widespread litigation under MCL 400.112g(4) by effectively transferring the estate recovery mandate over to the trial courts. But see 42 CFR 431.10(e) (single state agency must supervise plan and develop policy relating to programs). Under the Court of Appeals' invitation, personal representatives would be encouraged to use administrative costs, such as escalating attorney fees, as a sword to preserve inheritances and prevent estate recovery. See MCL 700.3805 (administrative costs are paid *before* the Department's claim). Whether the Department is complying with MCL 400.112g(4) is a determination subject to review by the Legislature, not the courts. MCL 400.112j(2).

The Department's policy provides that whether recovery is cost-effective is subject to the Department's "sole discretion." But the Court of Appeals states that there are no standards on how the Department evaluates the cost versus benefit of recovery. *Gorney*, _ Mich App at _; slip op at 6 (opinion of the Court). The Court of Appeals is incorrect and ignores the operative Medicaid State Plan: "Recovery is considered cost-effective when the potential recovery amount of the estate exceeds

the cost of filing the claim and any legal work dealing with the claim, or if the recovery amount is above a $1,000 threshold." (Medicaid State Plan 4/1/2012, 4.17-A, p 3.)

To be sure, the Department's actions may be constitutionally challenged if it pursued recovery against decedents based on their race, gender, or ethnicity. See *Warda v City Council of City of Flushing*, 472 Mich 326, 335 (2005) (even if there is no statutory basis for review, decisions of governmental agencies must still comply with state and federal constitutions). But none of these situations are involved here or even remotely suggested.

In *Warda*, this Court held that the judiciary cannot review discretionary actions by a government agency to reimburse private attorney fees incurred by a government employee. *Id.* at 335. While the statute in *Warda* used the term "may" and MCL 400.112g(4) uses the term "shall," both statutes lack "judicially comprehensible standard[s]" that limits judicial review. *Id.* at 339. "Absent a comprehensible standard, judicial review cannot be undertaken in pursuit of the rule of law, *but only in pursuit of the personal preferences of individual judges*." *Id.* at 339-340 (emphasis added).

Opening MCL 400.112g(4) up to judicial review will throttle estate recovery based on the preferences of individual judges. In looking to the first prong regarding the costs of recovery, the statute is silent on what costs may be considered and at what point in time the costs must be evaluated. For example, a distant probate court may require the Department's counsel to travel several hours

to appear in-person for a rudimentary, five-minute scheduling conference thereby increasing the costs of recovery. Another case with the same amount of assets, in a neighboring yet still remote county, may allow the Department's counsel to appear by telephone for such a routine matter, and, therefore, substantially reduce the costs of recovery. Under the Court of Appeals' precedent, however, the Department will be forced to arbitrarily pursue recovery based on the hurdles imposed by the personal preferences of a particular court, not through a uniform state policy.

Moreover, it is impossible to know what the costs of recovery are until after probate administration is completed because MCL 700.3805 sets forth the priority of payments for all claims. The personal representative may end up litigating away all of the estate assets through escalating attorney and personal representative fees such that there is nothing left to recover. This is because the Department's estate recovery claim is paid *after* the personal representative, his or her attorney, or both are reimbursed for any fees and costs incurred in preventing estate recovery. MCL 700.3805(1). But see MCL 700.3703(1) (personal representative owes duty to act in best interest of the estate, including allowed claims). The heirs have nothing to lose by fighting estate recovery if this decision stands.

Here, had Ketchum's estate not summarily disallowed the Department's claim, an all-too-common practice by probate practitioners, there would have been funds available to pay the valid claim. Even after the litigation was concluded regarding the disallowance there was *at least* $1,000 available to reimburse Michigan's taxpayers, which is consistent with the State Plan.

The danger of the Court of Appeals' holding is that should estates disallow a valid estate recovery claim to simply increase recovery costs, then the Court of Appeals is directing the Department to simply collapse under the threat of those costs. But if the disallowance is not set aside, the Department faces a permanent bar from *any* recovery pursuant to MCL 700.3804(2)—even for estates that are later reopened for after-discovered assets. MCL 700.3959 ("A claim previously barred shall not be asserted in the subsequent administration.").

Lastly, under the second prong the Legislature did not provide standards for determining when recovery is "in the best economic interest of the state." MCL 400.112g(4). That determination is left to the Department. Given the skyrocketing costs of long-term care, *any* recovery would be in the state's best interest because it ensures that public benefits are available for future recipients. Trial courts should not be the gatekeepers by making policy decisions on when it is in the State's best economic interests to pursue recovery See *Straus v Governor*, 459 Mich 526, 531 (1999) ("We cannot serve as political overseers of the executive or legislative branches, weighing the costs and benefits of competing political ideas or the wisdom of the executive or legislative branches in taking certain actions, but may only determine whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch."); see also *Koziarski v Dir, Michigan Dep't of Social Services*, 86 Mich App 15, 21 (1978) ("[I]t is not our province to second guess the appropriateness of the manner in which scarce public welfare funds are disbursed.").

In sum, MCL 400.112g(4) does not provide a judicial defense to estate recovery by inviting the trial courts to second guess the Department's determinations on when recovery is in the best economic interests of the State. That determination is left to the Department, subject to legislative review. This Court should grant leave and prevent the flood of wasteful litigation.

CONCLUSION AND RELIEF REQUESTED

Medicaid—a federal program designed to assist the poor—is not intended to use long-term care benefits to subsidize inheritances for recipient's heirs. The Court of Appeals incorrectly found a right to dispose of property as an inheritance by ignoring that MCL 400.112k was enacted before the decedents here began receiving Medicaid. Because there was no vested property right, implementation of estate recovery did not violate procedural or substantive due process. And whether the costs of recovery are in the best economic interests of the state is left to the Department's determination, subject to legislative reporting. The trial courts should not be invading such policy determinations.

Accordingly, the Department respectfully requests that this Court grant leave to appeal and reverse the Court of Appeals for the reasons articulated in the well-reasoned dissent.

Respectfully submitted,

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